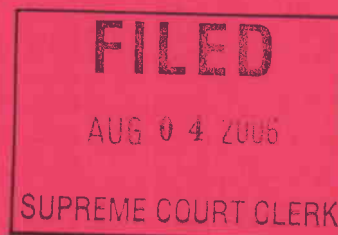


COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2005-SC-000414-D



CARROLL L. WITTEN, JR., M.D., and
WITTEN, SHERMAN & CATALANO, PLLC

APPELLANTS

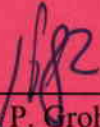
v. ON DISCRETIONARY REVIEW
FROM COURT OF APPEALS CASE NO. 2004-CA-000551
JEFFERSON CIRCUIT COURT NO. 02-CI-02802

BONNIE PACK, ADMINISTRATRIX FOR
THE ESTATE OF JAMES PACK

APPELLEE

BRIEF FOR APPELLANTS

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of August, 2006, the undersigned mailed a true and correct copy of this Brief for Appellants, postage prepaid, to the following: Gary R. Hillerich, Esq., 1800 Kentucky Home Life Building, 239 S. Fifth Street, Louisville, KY 40202-3213 and Irwin M. Ellerin, Esq., Ellerin & Associates, Suite 910, The Lenox Building, 3399 Peachtree Road, N.E., Atlanta, Georgia 30326, Counsel for Appellee; Hon. James M. Shake, Judge, Jefferson Circuit Court, Division Two, Jefferson Judicial Center, 700 West Jefferson Street, Louisville, KY 40202. It is further certified that the Record on Appeal has not been removed by the undersigned.



James P. Grohmann

I. INTRODUCTION

This is a medical malpractice case in which the court of appeals vacated a jury verdict in favor of the physician and remanded for a new trial.

The court of appeals held that the trial court erred in failing to direct a verdict that Dr. Witten had been negligent in the operating room when his feet momentarily slipped on the floor. Yet no witness – not even Pack's own expert – considered Dr. Witten to have been at fault for having slipped. The jury heard proof that the slip caused no injury to the patient.

II. STATEMENT CONCERNING ORAL ARGUMENTS

Dr. Witten welcomes the opportunity to discuss these issues with the Court. To the extent the Court's decision may impact other cases, that impact may be best addressed orally rather than in legal memoranda.

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IV. STATEMENT OF THE CASE

A. The Parties

Throughout, we will most often refer to appellants, Carol L. Witten, Jr., M.D. and Witten, Sherman & Catalano, PLLC, and appellant's counsel, as "Dr. Witten." They were defendants at trial and appellees at the court of appeals. The PLLC is a party solely for purposes of its vicarious liability for the acts of Dr. Witten.

We will most often refer to appellee, Bonnie Pack, administratrix for the Estate of James Pack, and her attorney, as "Pack." James Pack was Dr. Witten's patient. His estate was the plaintiff at trial and the appellant at the court of appeals.

B. Procedural History

Capsule: The medical malpractice case went to trial, with both sides presenting experts on standard of care and causation. The jury found in favor of Dr. Witten. The trial court denied Pack's motion for a judgment JNOV and/or for a new trial. Pack appealed.

The court of appeals affirmed in part but vacated in part on the grounds that the jury should have been instructed that Dr. Witten had been negligent as a matter of law.

Pack filed her complaint against Dr. Witten in April of 2002, alleging medical negligence. An amended complaint added a claim for wrongful death.

Discovery proceeded amicably, with the depositions of a few fact witnesses, treating physicians, and opposing experts on both standard of care and causation.

The case was tried from December 15, 2003 through December 22, 2003. Without objection, and not raised as error on appeal, the jury was instructed in typical Palmore fashion.

It was the duty of the defendant, Carroll L. Witten, Jr., to exercise that degree of care and skill which an ordinarily prudent, skillful and knowledgeable physician specializing in orthopedic surgery would

exercise under similar circumstances as shown in this case. If you are satisfied from the evidence that the defendant, Carroll Witten, Jr., M.D., failed to exercise the degree of care required of him, and that such failure was a substantial factor in causing injuries to and/or the death of James Pack, you will find for the plaintiff. Otherwise you will find for the defendants.

The jury checked "NO", and returned a verdict in favor of Dr. Witten. Appendix 1. The trial court entered a judgment consistent with this verdict on January 6, 2004. Appendix 2.

Pack filed a timely motion for a judgment notwithstanding the verdict or, alternatively, for a new trial. Pack's only grounds for the motion was the contention that Dr. Witten had expressed "judicial admission" that he had been at fault.

The trial court denied the motion because "the statements referenced by the plaintiff are clearly equivocal." "Since there was overwhelming expert testimony that the defendant did not breach the standard of care and by so doing caused the plaintiff's damages, it is clear that the jury's verdict was supported by substantial evidence well within the law." Appendix 3.

C. Facts and Issues From the Trial

Capsule: Dr. Witten performed a total right hip replacement on Mr. Pack. A prosthetic "ball and socket," like placing your fist hard against your opposite hand, places the hip at increased risk of immobility, but guarding against that risk places the hip at risk for dislocation. Immobility and dislocation are complications of the procedure, and not necessarily the product of malpractice. There is no sure way to guard against both complications simultaneously except to do what Dr. Witten did in this case. Dislocations most frequently occur in the recovery room, when the patient first awakes and moves but the patient's hip muscles haven't adequately contracted to take control of the new hip.

Here, Mr. Pack's hip dislocated in the recovery room. Pack claimed at trial that it dislocated when Dr. Witten slipped in the operating room. However, a defense expert explained why that was not likely the case, and Dr. Witten explained that, upon slipping, he placed the new hip through a careful range of motion which revealed no dislocation.

After that hospital stay, Mr. Pack's hip dislocated chronically, and another prosthetic hip was implanted.

On November 30, 2001, Mr. Pack passed away secondary to a sudden cardiac arrhythmia. Two defense experts testified that the arrhythmia was not related to the hip procedure or the pain medication Mr. Pack had been taking.

1. Dr. Witten's Care of Mr. Pack

Dr. Witten is an orthopaedic surgeon practicing in Louisville, Kentucky, with his partners at Witten, Sherman & Catalano, PLLC. He has been board certified in orthopaedic surgery since 1984. [Dr. Witten; TAPE 2; 12/16/03; 14:50:38].

Dr. Witten first became involved in the care of James Pack in April 2001. [TAPE 2; 12/16/03; 14:24:55]. Mr. Pack sought treatment for post-traumatic osteoarthritis of his right hip. [TAPE 2; 12/16/03; 11:47:48]. After conservative treatment failed, Mr. Pack elected to undergo a total right hip replacement.

Mr. Pack's surgery involved the insertion of an Osteonics brand implant into his hip area via a posterior approach. [TAPE 1; 12/16/03; 11:48:30]. When replacing a hip, the surgeon's goal is to make sure the parts of the implant are inserted tightly enough to stay in place, but not too tightly to prevent proper functioning. [TAPE 2; 12/16/03; 11:54:52]. The size or "fit" of the implant is an important factor in achieving this goal. [TAPE 2; 12/16/03; 11:54:52; 11:56:22]. Nevertheless,

immobility and dislocations do occur. Dr. Witten testified that dislocations are a risk of all hip replacement surgeries. [TAPE 2; 12/16/03; 14:33:16].

Dr. Witten tentatively plans the size of the implant before the surgery by using clear plastic templates. [TAPE 2; 12/16/03; 14:02:35]. However, a surgeon cannot just look at the patient's height and weight and know what size implant will be needed. [TAPE 2; 12/16/03; 14:12:38]. The appropriate size is determined after surgery begins by "truly how it fits in the patient." [TAPE 2; 12/16/03; 14:03:20]. For this reason, a major part of Mr. Pack's surgical procedure involved Dr. Witten's and Dr. Catalano's efforts at fitting the different components of the hip implant.

The first step was to put in the acetabular cup, i.e., the "socket," and size it by using a reamer. [TAPE 2; 12/16/03; 14:03:20]. Dr. Witten then put the stem of the implant down the shaft of the femur by reaming it out with a rasp (an instrument akin to a drill bit). [TAPE 2; 12/16/03; 14:04:00]. Dr. Witten tried different sizes of rasps to determine which had the best fit. He took an intra-operative x-ray to make sure it was sitting properly and the cup was oriented properly. [TAPE 2; 12/16/03; 14:15:55]. After putting the stem down the shaft, Dr. Witten attached different heads (the "ball" in this "ball and socket" device) with different necks on the stem. He tested each for fit, to see if it could be dislocated. [TAPE 2; 12/16/03; 14:05:47]. After Dr. Witten was satisfied with the implant fit, he removed the trial components and inserted the implantable components. [TAPE 2; 12/16/03; 14:18:20].

Dr. Witten felt that he had achieved the right amount of tension and the right neck length and implant fit for Mr. Pack, but there was no guarantee. [TAPE 2; 12/16/03; 14:09:40]. Had Dr. Witten chosen larger prosthetic devices to serve as an extra safeguard against dislocation, it would have been contrary to good surgical practice, since that would have been contrary to the "fit" tests he'd performed and likely lead to poor mobility of the joint.

Dr. Witten explained that after a surgery is over, he holds the patient's leg until a pillow is placed between the patient's legs to hold the hip in place while they turn the patient over. [TAPE 2; 12/16/03; 11:52:03].

While holding Mr. Pack's leg, Dr. Witten slipped. [TAPE 2; 12/16/03; 11:52:35]. Dr. Witten did not think he had dislocated Mr. Pack's hip when he slipped. [TAPE 2; 12/16/03; 11:52:44]. He put the hip through a careful range of motion to be sure. [TAPE 2; 12/16/03; 11:52:44].

While Mr. Pack was in the recovery room, a routine post-operative x-ray showed the hip to be dislocated. [TAPE 2; 12/16/03; 12:00:35]. Dr. Witten and Dr. Catalano returned to the recovery room and were able to reduce the hip back into place; i.e., a "closed reduction" of the dislocation. [TAPE 2; 12/16/03; 12:01:10]. Another x-ray showed satisfactory alignment of the hip. [TAPE 2; 12/16/03; 14:39:30].

Pack, at trial and on appeal, trumpets the fact that the slip is not discussed in the medical chart, as if the event were hidden. Yet it is undisputed that Dr. Witten told the Packs immediately about it.

2. Pack's Orthopedic Expert's Testimony

Pack's expert orthopaedic witness at trial was Dr. Alice Martinson. Dr. Martinson never suggested that Dr. Witten had been negligent when he slipped. Dr. Martinson testified that Dr. Witten's initial surgery on July 25, 2001, the choice to do it, and the choice of implant he used were all appropriate. [Dr. Martinson; TAPE 2; 12/17/03; 9:54:55]. In her opinion, Dr. Witten also appropriately performed the closed reduction of the dislocation discovered by x-ray taken in the immediate post-operative period. [Dr. Martinson; TAPE 2; 12/17/03; 11:08:50]. Dr. Martinson's only criticisms of Dr. Witten involved care rendered *after* the closed reduction. [Dr. Martinson; TAPE 2; 12/17/03; 09:6:05]. She contended Dr. Witten should have better cautioned Mr. Pack on

movements to avoid and should have replaced certain parts of the prosthetic hip when performing a subsequent open reduction.

3. Dr. Witten's Orthopedic Expert's Testimony

Dr. Witten presented testimony from another orthopaedic surgeon, Dr. Martin McTighe, as an expert witness on the standard of care and causation of Mr. Pack's hip dislocations. Dr. McTighe testified that Dr. Witten had done nothing wrong in his care and treatment of Mr. Pack. [Dr. McTighe; TAPE 3; 12/18/03; 10:41:10]. He did not testify that Dr. Witten's slip in the operating room was a deviation from the standard of care. He testified that the surgery of July 25, 2001 was performed appropriately by Dr. Witten and that he had inserted the appropriate size and configuration of implantable components in Mr. Pack's hip. [Dr. McTighe; TAPE 3; 12/18/03; 10:45:00].

Dr. McTighe explained that the determination of what size implant to use depends on the size of the patient's bone. Dr. McTighe testified about the step by step process surgeons use to determine which implant fits the best:

First of all, we start with 'what size femoral head did he have?' and start from there to enlarge the acetabulum to put an artificial acetabulum in. And at each step we go one millimeter at a time, gradually enlarging the size of the acetabulum. And once we get to a spherical bleeding bone area where we know that the bone will be able to grow in, that we don't have old diseased bone or bone that's too hard to generate the new bone that has to grow into the prosthesis then we know we've reached the right size. Then we put trial components in, you get a picture to see what it looks like – are things balanced from that standpoint – and then we proceed from there.

[Dr. McTighe; TAPE 3; 12/18/03; 10:50:25]. He testified that, despite surgeons' best efforts, the prosthesis comes out of place while the patient is still in the recovery room about 2-4% of the time, and that it was occurred here. [Dr. McTighe; TAPE 3; 12/18/03; 10:52:06].¹

4. Follow Up Care

Dr. Witten discharged Mr. Pack from the hospital on July 29, 2001. Nothing about Mr. Pack's post-surgical hospital stay indicated to him any problems with Mr. Pack's hip. [Dr. Witten; TAPE 2; 12/16/03; 14:40:30]. Mr. Pack voiced no complaints of pain, but rather said he was doing fine and ready to go home. [TAPE 2; 12/16/03; 13:44:40].

During Mr. Pack's follow-up visit on August 13, 2001, an x-ray was taken which showed that the hip had again become dislocated. [Dr. Witten; TAPE 2; 12/16/03; 13:35:40]. Mr. Pack's hip had probably become dislocated sometime after he returned home from the hospital on July 29, 2001. [TAPE 2; 12/16/03; 13:37:40].

On August 14, 2001, Dr. Witten performed an open surgery on Mr. Pack to reduce the hip dislocation.² Once the hip was back in place, Dr. Witten put Mr. Pack's hip through a full range of motion. [TAPE 2; 12/16/03; 14:46:30]. Dr. Witten was unable to get Mr. Pack's hip to dislocate in any position he put him in. [TAPE 2; 12/16/03; 13:59:55].

Mr. Pack's hip dislocated yet another time on August 19, 2001. Dr. Witten's partner, Dr. Catalano, elected to insert a new prosthesis. The hip muscles and tendons likely stretched out after

¹ Dr. McTighe testified to other opinions, but Dr. Witten will not include them here since they go beyond the issues that Pack has raised on appeal.

² Dr. Witten testified that he considered this to be Mr. Pack's first true dislocation – since it was the first dislocation after Mr. Pack was able to control his hip following surgery. He explained that the standard of care was to reduce it and give it a chance to heal and stay in place. If it would not, then they could think about doing something else for Mr. Pack. [Dr. Witten; TAPE 2; 12/16/03; 14:47:40].

the dislocations and several surgeries, necessitating a longer prosthesis. [Dr. Witten; TAPE 2; 12/16/03; 14:00:15]. [Dr. Witten; TAPE 2; 12/16/03; 11:59:30].

Pack alleged that Mr. Pack died as a result of an interaction between the methadone he was taking for pain and some other prescribed medications. The jury heard the testimony of two experts to counter this theory. George Rodgers, M.D., a toxicologist, testified that the amount of methadone Mr. Pack had taken could not have a lethal effect on him because he had developed a tolerance to the drug. [Dr. Rodgers; TAPE 3; 12/19/03; 14:30:00]. A post mortem toxicology screen revealed not only were the blood levels of medications non-lethal, they were non-toxic as well. In addition, a cardiac pathologist, Doug Ackermann, M.D., testified that Mr. Pack had died of hypertrophic cardiomyopathy. [Dr. Ackermann; TAPE 3; 12/19/03; 15:35:00].

The jury returned a verdict on December 22, 2001 in favor of Dr. Witten. A Judgment was entered in accordance with the jury's verdict on January 6, 2004.

5. The "Slip"

What of the slip in the operating room upon which the court of appeals based its decision?

This much we know:

1. Pack's only standard of care offered no criticisms of that event. All of her criticisms were of post-operative events.

2. The three defense standard of care experts offered no criticisms of the "slip" incident.

Did the slip *cause* the dislocation? This we know from the record:

1. Dr. Witten's orthopedic surgery expert testified the slip did *not* cause the dislocation.

"He probably didn't dislocate it at that time."

2. Pack admits that whether the slip caused the dislocation was a jury issue. If this admission is now withdrawn, it does not matter. Pack has waived the issue by not moving for a

directed verdict on it. "Appellant recognizes jury issues as to causation. The motion for a directed verdict at the conclusion of all the evidence was solely on the basis of liability – not causation." Reply Brief for Appellant, at p. 4. Appendix 4.

D. The Opinion From the Court of Appeals

Capsule: The court of appeals held that "the jury should have been instructed that the doctor was negligent as a matter of law with respect to the initial accident of the jerking of his patient's leg in the operating room. Because we are unable to determine the possible impact on the jury caused by the trial court's failure to direct the verdict on this issue, the entire verdict is tainted." Appendix 5.

As referenced several times already in this brief (and this won't be the last), the court of appeals' decision does violence to the trial court record. As will be shown in the argument section, it does violence to Kentucky law on medical malpractice and, for that matter, slip and falls.

The court of appeals correctly recited that, at this stage of the proceedings, "all evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence."

However, on some very key points, the court of appeals did not take as true all evidence favoring Dr. Witten, the prevailing party.

1. The court of appeals mistakenly assumed that Dr. Witten's slip caused the hip dislocation.

The court of appeals wrote that, "at the conclusion of the surgery while Pack was still anesthetized, Dr. Witten slipped in water in the operating room while holding Pack's leg, jerking the leg so severely as to dislocate the hip that had just been replaced."

Yet, the jury heard evidence contrary to this summary. Dr. Witten testified that, at the time of his slip, he did not think he had dislocated Mr. Pack's hip. He put the hip through a careful range of motion just to be sure. Dr. Witten testified as follows:

Q. Did you know at that time, doctor, whether you had dislocated the hip?

A. I did not think I had.

Q. It crossed your mind?

A. I wanted to check it but it seemed to have a good range of motion and I decided I hadn't been jolted enough that I would have done anything to him.

The jury also heard from orthopedic surgery expert Dr. McTighe who testified that Dr. Witten did *not* cause the hip to dislocate at the time of the slip. "All in all, I think he is probably wrong – that *he probably didn't dislocate it at that time.*" [TAPE 3; 12/18/03; 11:44:57].

The court of appeals did not acknowledge the fact that Pack stipulated that causation remained a jury issue. "Appellant recognizes jury issues as to causation. The motion for a directed verdict at the conclusion of all the evidence was solely on the basis of liability – not causation."

2. The court of appeals substituted its standard of care determination in place of that of the experts and the jury.

It is on deviations from standard of care that the opinion becomes more difficult to follow. The court of appeals acknowledged a jury issue as to whether the slip in the operating room constituted a deviation from the standard of care, but decided that a directed verdict was required.

The court of appeals, in reviewing the testimony of plaintiff's expert, Alice Martinson, M.D., noted that she was not of the opinion that the slip constituted negligence:

Dr. Martinson did not believe that Dr. Witten's slip in the operating room constituted a deviation from the standard of care; nor did she criticize the doctor's choice of the size or positioning of the prosthesis.

The court of appeals acknowledged that Dr. Witten's orthopedic experts likewise had no criticisms of Dr. Witten:

Dr. Witten presented two orthopedic surgeons as his expert witnesses. Dr. Catalano and Dr. McTighe both testified that Dr. Witten did not deviate from the standard of care in any manner in his treatment of Pack.

Thus, the court of appeals cited to three testifying orthopedic surgeons, one of whom had been retained by the plaintiff, expressing no criticisms of Dr. Witten's slip in the operating room.

We also have a jury who found in favor of Dr. Witten.

V. ARGUMENT

A. A Reviewing Court Must Draw All Reasonable Inferences In Favor of Dr. Witten

1. Standard of Review and Directed Verdicts

A reviewing court applies the same standard of review whether it is reviewing a lower court's decision to deny a motion for a directed verdict or to deny a motion for a judgment notwithstanding the verdict. Pritchard v. Bank Josephine, Ky.App., 723 S.W.2d 883 (1987). It must view the evidence in a light that is most favorable to the opposing party and give the opposing party every fair and reasonable inference that can be drawn from the evidence. Taylor v. Kennedy, Ky.App., 700 S.W.2d 415, 416 (1985). The trial court may only grant a judgment notwithstanding the verdict where "there is a complete absence of proof on a material issue in the action, or if no disputed issue or fact exists upon which reasonable men could differ." Id.

"A motion for directed verdict admits the truth of all evidence which is favorable to the party against whom the motion is made. Upon such motion, the court may not consider the credibility of evidence or the weight it should be given, this being a function reserved to the trier of fact." NCAA v. Hornung, Ky., 754 S.W.2d 855, 860 (1988) (citations omitted). "... [T]he trial court must determine whether the evidence favorable to the party against whom the motion [for a directed verdict] is made is of such substance that a verdict rendered thereon would be 'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" Id.

"In reviewing the sufficiency of evidence, the appellate court must respect the opinion of the trial judge who heard the evidence. A reviewing court is rarely in as good a position as the trial judge who presided over the initial trial to decide whether a jury can properly consider the evidence presented." Bierman v. Klapheke, Ky., 967 S.W.2d 16, 18 (1998). "The reviewing court, upon

completion of a consideration of the evidence, must determine whether the jury verdict was flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice. If it was not, the jury verdict should be upheld.” Bierman, 967 S.W.2d at 19.

The trial court’s denial of Pack’s motion for a directed verdict was not clearly erroneous, and the court of appeals erred in setting aside the jury’s verdict. This is demonstrated, principally, by the court of appeals’ failure to draw inferences in favor of Dr. Witten.

Dr. Witten concedes that Pack can cite to testimony that Dr. Witten was at fault and caused the dislocation. Presenting that testimony, however, does not eliminate reasonable inferences to the contrary.

2. Inferences Which Must Be Drawn In Favor of Dr. Witten

The court of appeals wrote that Dr. Witten’s slip “jerked the leg so severely as to dislocate the hip that had just been replaced.” The court of appeals should have respected Dr. Witten’s testimony that, upon slipping, he placed the hip through “a good range of motion and I decided I hadn’t been jolted enough that I would have done anything to him.” The court of appeals should have respected the testimony of Dr. Witten’s orthopedic expert, Dr. McTighe, who testified that Dr. Witten probably did not cause the hip to dislocate at that time.

The court of appeals did not respect the inference that Dr. Witten had not been negligent when he slipped.

Declaring this to have been an initial negligent act does not respect reasonable inferences from the testimony of Pack’s expert witness, Dr. Martinson, who offered no criticisms of this event. The court of appeals acknowledged, in contradiction to its ruling, “Dr. Martinson did not believe that Dr. Witten’s slip in the operating room constituted a deviation from the standard of care; nor did she criticize the doctor’s choice of the size or positioning of the prosthesis.” The court of appeals did

not respect the reasonable inferences to be drawn from Dr. Witten's own orthopedic experts, even though it acknowledged such testimony supported the jury's verdict. "Dr. Witten presented two orthopedic surgeons as his expert witnesses. Dr. Catalano and Dr. McTighe both testified that Dr. Witten did not deviate from the standard of care in any manner in his treatment of Pack." By honoring these inferences, this Court ought to restore the jury's verdict.

B. A Slip Does Not Require A Finding of Negligence

1. Kentucky "Slip and Fall" Law

It is not proper for a reviewing court to disregard the testimony that the slip by Dr. Witten was not the product of his negligence. Should the Court declare, as a matter of law, that *any* slip is negligent as a matter of law? If so, that would be a first.

When someone slips – be it a plaintiff or a defendant – that person is not deemed negligent as a matter of law; rather, there must be proof that the person did not exercise reasonable care. The issue is properly submitted to the jury for a decision. Wal-mart Stores, Inc. v. Lawson, Ky.App., 984 S.W.2d 485 (1988); Jones v. Winn-Dixie of Louisville, Inc., Ky., 458 S.W.2d 767 (1970).

We go back to pre-Hilen days for cases where contributory fault of the plaintiff in a slip and fall case operated as a complete bar to any recovery. Repeatedly, the court found that whether fault attaches to the person who slipped is an issue for the jury. This is so even in the face of very good arguments that the person who slipped had not been as careful as he or she could have been. Hornbeck v. Food Basket No. 1, Ky., 494 S.W.2d 87 (1973) ("admittedly, Mrs. Hornbeck could have seen the sacks on the floor had she looked. "Whether the plaintiff in this case was negligent ... is simply a jury question."); Downing v. Drybrough, Ky., 249 S.W.2d 711 (1952) (plaintiff not contributory negligence as a matter of law when patron slipped in parking lot when leaving the lot via the wrong aisle); Kroger Grocery & Baking Co. v. Monroe, 237 Ky. 60, 34 S.W.2d 929 (1931)

(plaintiff not guilty of contributory negligence, as a matter of law, even though she observed the presence of oil on the floor before her slip and fall).

Here, the jury was presented with *positive* proof, via all the experts, that Dr. Witten had not been negligent when he slipped. There was also an *absence* of proof by Pack. Pack did not advance any proof or argument that Dr. Witten had notice of a slippery substance on the floor, wore inappropriate shoes, engaged in ill-advised fancy footwork while in the operating room ... nothing.

Remember, so long as there may be a reasonable inference that Dr. Witten had not been negligent, the verdict must stand

2. Kentucky Law Regarding A Directed Verdict Against A Physician In A Medical Malpractice Case

Dr. Witten cannot find authority which supports the proposition that a physician under these circumstances should be declared negligent as a matter of law. We are familiar with the retained foreign body cases which are being addressed by this Court, *e.g.*, Laws v. Harter, Ky., 534 S.W.2d 449 (1975); Chalothorn v. Meade, Ky.App., 15 S.W.3d, 391 (2000); being addressed in Nazar, et al. v. Branham, 2005-SC-834. These cases reflect a debate among litigators and our courts over the legal implications of a retained foreign body. In Laws, the surgeon was actually told by a nurse that the sponge count was wrong prior to completing the procedure, but closed the incision anyway. The court found the surgeon's excuse for closing unacceptable and declared the surgeon to have been negligent *per se*. In Chalothorn, the surgeon was advised that all sponges had been accounted for, and closed. Later, a sponge was discovered to have been left inside. The court found that this was *not* an instance of negligence *per se*.

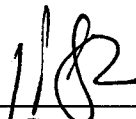
Negligence *per se* against a health care provider is difficult to find. The plaintiff in Estes v. King's Daughters Medical Center, 59 Fed. Appx. 749 (6th Cir. 2003) (applying Kentucky law)

declined to find a hospital negligent *per se* when its nurses violated hospital procedures. In Butts v. Watts, Ky., 290 S.W.2d 777 (1956), a jury issue was created – not negligence *per se* – when a dentist left a broken fragment of a tooth imbedded in the patient’s jaw though the fragment could have been easily discovered. In Neal v. Wilmoth, Ky., 342 S.W.2d 701 (1961), a dentist *slipped* while drilling into a patient’s mouth, causing serious damage. The court did *not* hold that the dentist was negligent as a matter of law for having slipped. It held “that this was a sufficiently obvious indication of negligence to take the case *to the jury* without the support of expert testimony.” Neal, 332 S.W.2d at 702 (emphasis added). See, also, Perkins v. Hausladen, 828 S.W.2d 562 (1992), addressing *res ipsa* and its application to medical malpractice cases. The doctrine allows plaintiffs to get their medical malpractice cases to the jury without an expert under certain scenarios. The doctrine does not take the case away from the jury. Dr. Witten does not ask for more than this: allow the jury to decide his case.

VI. CONCLUSION

The trial court was not clearly erroneous in denying Pack's motion for a directed verdict on the issue of negligence. We have viewed the trial tapes ourselves and accept that Pack can ably construct quotations which would support a jury verdict in Pack's favor.

Respectfully, that is not the standard the trial court was to apply upon ruling upon Pack's motion for a directed verdict on the issue of negligence. Such quotes should fail to meet the more strict standard applied by a reviewing court which, under Bierman, "must respect the opinion of the trial judge who heard the evidence."



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